IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG DIVISION

BANK OF CHARLES TOWN,

Plaintiff,

v. **Civil Action No. 3:10-CV-102**

ENCOMPASS INSURANCE, et al.

Defendants.

PLAINTIFFS RESPONSE IN OPPOSITION TO THE EMCOMPASS DEFENDANTS' MOTIONS TO DISMISS PURSUANT TO FED. R. CIV.P. 12(b)(6)

COMES NOW the Plaintiff, by and through its counsel, Laura C. Davis, Stephen G. Skinner, and the Skinner Law Firm, and as its Response in Opposition to the Encompass Defendants' Motions to Dismiss, does state as follows:

INTRODUCTORY STATEMENT

On August 27, 2010, the Plaintiff filed its Complaint against Encompass Insurance, Encompass Indemnity Company, Michelle Grossman, and John Willson in the Circuit Court of Jefferson County, West Virginia. On October 6, 2010, Encompass Insurance Company, Encompass Indemnity Company (hereinafter the "Encompass Defendants"), and Michelle Grossman removed this case to this Court on the basis of diversity jurisdiction.

Plaintiff asserted four (4) Counts against the Encompass Defendants—only one of which was also asserted against Michelle Grossman, John Willson and the John/Jane Doe Defendants.[1]

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[1] Plaintiff sued the individual defendants for violations of the UTPA, as set forth in Count II. Count I—as the heading indicates—is against the Encompass Defendants alone. Count III for declaratory judgment concerns the insurance policy and thus, is asserted against the Encompass Defendants. Count IV is for estoppel/waiver which similarly implicates the Encompass Defendants alone. Although Michelle Grossman filed a motion to dismiss Counts I, III, and IV against her, Plaintiff only intended to sue her in Count II for UTPA violations. However, because this Court lacks subject matter jurisdiction as set forth herein, this Court need not to rule upon Grossman's motion as it should be remanded to state court as well.

Only three of the claims against the Encompass Defendants, for breach of contract, breach of the duty of good faith and fair dealing, and UPTA violations, can result in monetary damages.

The Plaintiff did not assert specific monetary damages in its Complaint. The Plaintiff sought undetermined compensatory damages for loss to property, for denial of coverage, and undetermined compensatory and punitive damages for the Encompass Defendants' breach of contract, first party bad faith, and UTPA violations. No monetary sum was asserted against Defendants Grossman, Willson, and the John and Jane Doe either.

For the reasons set forth in Plaintiff's Motion to Remand, the Defendants cannot meet their statutory burden of proving that the amount in controversy exceeds of $75,000, exclusive of interest and costs. 28 U.S.C. §1332(b). Thus, this Court lacks subject matter jurisdiction and the Plaintiff respectfully requests that it abstain from ruling on the Defendants' Motions to Dismiss and remand the case to state court for further proceedings.

In the alternative, should this Court find that federal jurisdiction exists, the Plaintiff asks that it deny the Defendants' motion as it is predicated upon a misrepresentation of fact. Encompass Indemnity incorrectly asserted that the water damage occurred on or about May 31, 2010, after the subject home was foreclosed upon.[2] However, the Encompass's June 11, 2010 reservation of rights letter confirms that the Palmers reported not only a water damage claim, but also a *mold* claim. (See Exhibit A to Motion to Dismiss, doc. 7-1 on the CM/ECF system). The Palmers' discovery of mold on May 31, 2010, indicates that the water damage actually occurred *prior* to the foreclosure on May 27, 2010. The Encompass Defendants lack any evidence to support a contrary conclusion.

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[2] Defendants refer the Court to ¶ 23 of the Plaintiff's Complaint although this paragraph refers only to when the Palmers *reported* the loss, not when the loss happened. It is quite clear from the Complaint that the Palmers were unaware of how or when the property damage in their basement occurred.

Thus, the only question before this Court is whether the loss occurred before the foreclosure on May 27, 2010, when the Palmers undisputedly had an insurable interest.[3] Quite clearly, this is a genuine issue of material *fact* that cannot be decided summarily by the Court. Accordingly, for the reasons stated herein, if this Court does not remand this case and abstain from ruling on Encompass Indemnity's Motion to Dismiss, it must deny the same as a matter of law.

The same is true with respect to Encompass Insurance Company's Motion to Dismiss. Plaintiff sued Encompass Insurance, as that was the name of the company on Michelle Grossman's business card (see **Exhibit A**). Defendant has failed to come forward with any evidence to demonstrate that Encompass Insurance is not a proper party in interest. To the extent that employees of Encompass Insurance Company also adjust Encompass Indemnity's insurance claims, or receive paychecks from Encompass Insurance, said company may also be liable to the Plaintiff for its employees' violations of the UTPA. At this stage of the proceedings, there is no basis to decide with certainty that the Plaintiff will not be able to discover and prove a claim against Encompass Insurance and Encompass Insurance Company. Therefore, to the extent that this Court elects to rule on Defendant's motion, Plaintiff respectfully requests that it also be denied.

STATEMENT OF FACTS

1. Monte J. Palmer and Suzette S. Palmer agreed to purchase improved real property located at 11 Seattle Slew Way, in Martinsburg, West Virginia. (Find Real Estate Purchase Agreement, attached hereto as **Exhibit B**). The seller of the real estate was James A. Howard (a/k/a "Jim Howard").

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[3] Encompass Indemnity assumed for the purposes of its motion "that the Palmers may have at some point have had an insurable ownership interest in the Home and that the Policy may have been valid when issued." (See

2. The Palmers financed the purchase of the subject property though an installment sales contract with the original property owner, Jim Howard. (See **Exhibit B**).

3. After the Palmers signed the Purchase Agreement, they secured a homeowner's insurance policy through Encompass Indemnity Company, which underwrites Encompass Insurance (hereinafter collectively referred to as the "Encompass Defendants." (Find a copy of the Declarations Page attached hereto as **Exhibit C**).

4. On the Declarations Page, the Plaintiff was listed as "the mortgagee" and Jim Howard was listed as a person with an "interest" in insured premises at 11 Seattle Slew, Martinsburg, West Virginia. (See **Exhibit C**).

5. The Encompass Defendants, their selling agent, and underwriting department(s), knew, or with reasonable diligence should have known, of the relationship between the Palmers, Jim Howard, and the Plaintiff, at the time of the issuance of the subject insurance policy.

6. The Encompass Defendants, their selling agent, and underwriting department(s), obtained, or had every opportunity to obtain, the Agreement for the Purchase and Sale of the Improved Real Property with Preoccupancy Provision prior to issuance of the subject homeowner's insurance policy to the Palmers.

7. The Encompass Defendants, their selling agent, and underwriting department(s), obtained, or had every opportunity to obtain, a copy of the Deed for the subject property prior to issuance of the homeowner's insurance policy to the Palmers.

8. The Encompass Defendants regularly required and accepted premium payments from the Palmers for homeowner's coverage for the subject residence at 11 Seattle Slew Way, Martinsburg, West Virginia.

9. In the Spring of 2010, James Howard passed away.

Memorandum, doc. 8, p. 8 of 11 in the CM/ECF system).

10. On or about May 27, 2010, the Plaintiff foreclosed on the residence at 11 Seattle Slew Way in Martinsburg, West Virginia.

11. On May 28, 2010, the Plaintiff made contact with the Palmers and informed them that the Plaintiff had foreclosed on the property at 11 Seattle Slew Way.

12. On or about May 31, 2010, while in the process of moving from the insured location, the Palmers discovered mold and water damage in their basement. The Palmers notified the Encompass Defendants of the damage that day.

13. The Palmers and the Plaintiff sought coverage for the water damage/mold claim under the Palmers' Homeowners policy, for which the Palmers had paid premiums for years.

14. On June 11, 2010, the Encompass Defendants forwarded a reservation of rights letter to the Palmers advising that there may not be coverage for the water damage and *mold* claims. (See Exhibit A to Defendants' Motion, doc. 7-1 in the CM/ECF system).[4]

15. Despite repeated attempts, the Encompass Defendants refused to communicate with the Plaintiff regarding the status of its coverage investigation although the Plaintiff was the "mortgagee" on the policy and a first-party insured per *First Bank of Shinnston v. West Virginia Ins. Co.,* 185 W.Va. 754, 408 S.E.2d 777 (1991)(mortgagee listed on insurance policy is a first-party insured) and *Fliatreau v. Allstate Insurance Company*, 178 W.Va. 268, 358 S.E.2d 829 (1987)(sales contract gave buyer "equitable title" to the property and he had an insurable interest even though sales contract stated that risk of loss was on seller).

16. Since the Palmers first reported the claim on May 31, 2010, the Defendants' "investigation" has dragged on despite their obligation to timely affirm or deny coverage and to fairly settle insureds' claims. See West Virginia UTPA, W.Va. Code § 33-11-4(9)(e)-(g).

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[4] The listed mortgagee on the policy, the Plaintiff, was not sent a copy of this letter.

17. After requiring the Palmers to pay premiums for years, Defendants are attempting to engage in post-claim underwriting to defeat Plaintiff's rightful claim.

18. Defendants' bad faith handling of the instant claim has forced the Plaintiff to file.

APPLICABLE LAW

Recently, the U.S. Supreme Court reiterated that Rule 8 does not demand "detailed factual allegations" in the Complaint. *Ashcroft v. Iqbal,* U.S. ----, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)(internal quotation marks and citations omitted). Rather "[a] complaint need only give 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *In re Mills,* 287 Fed.Appx. 273, 280 (4th Cir.2008) (quoting Fed.R.Civ.P. 8(a)(2)). "[A] complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.' " *Iqbal,* 129 S.Ct at 1949 (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." "[D]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. See also Harman v. Unisys Corp.,* 2009 WL 4506463 *2 (4th Cir.2009).

The Court may consider the allegations contained in the complaint, the exhibits to the complaint, matters of public record, and other similar materials that are subject to judicial notice. *Anheuser-Busch, Inc. v. Schmoke,* 63 F.3d 1305, 1312 (4th Cir.1995). The Court may also consider documents attached to a defendant's motion to dismiss. *See e.g., Sec'y of State for Def. v. Trimble Navigation Ltd.,* 484 F.3d 700, 705 (4th Cir.2007).

When reviewing a Rule 12(b)(6) motion, the Court must assume all of the allegations to be true, must resolve all doubts and inferences in favor of the plaintiff, and must view the factual allegations in a light most favorable to the plaintiff. *Edwards v. City of Goldsboro,* 178 F.3d 231, 243-44 (4th Cir.1999). "[A] motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." *Johnson v. Mueller,* 415 F.2d 354 (4th Cir.1969).

ARGUMENT

For the purposes of Encompass Indemnity's Motion to Dismiss, it has assumed "that the Palmers may have at some point have had an insurable ownership interest in the Home and that the Policy may have been valid when issued." (See Memorandum, doc. 8, p. 8 of 11 in the CM/ECF system). The Defendant also asserts that the property damage claim happened on May 31, 2010 or June 2, 2010. (See Memorandum, doc. 8, p. 6 of 11). Defendant continues by asserting that when the Palmer's home was foreclosed upon on May 27, 2010, Palmer's insurable interest extinguished and so too did the Plaintiff's right to insurance proceeds. *Id.*

However, there is a critical difference between when a claim "occurs" and when it is "reported." While the Palmers *reported* the claim to Encompass on June 2, 2010, this does not mean that the damage "occurred" on that date. (See ¶ 23 of Complaint).[5] In fact, Defendant's reservation of rights letter actually suggests the *opposite* conclusion. (See Exhibit A to Defendants' Motion, doc. 7-1 in the CM/ECF system). The Palmers' discovery of mold on May 31st suggests that the water damage causing it occurred before the foreclosure on May 27th. The Defendant has failed to present any proof that the water damage occurred *after* the foreclosure. Thus, the issue of *when* the property damage occurred is a genuine issue of material fact that

[5] Encompass asserts that the Palmers actually *reported* the claim earlier, on May 31st. (See Memorandum, doc. 8, p. 2 of 11, n. 3 in the CM/ECF).

must be viewed in the light most favorable to the Plaintiff.

Thus, for the purpose of the Defendant's Motion to Dismiss, this Court must assume that the water damage and mold "occurred" prior to May 27, 2010, and that the claim arose while the Palmers undisputedly had an insurable interest in the home. In such case, the Plaintiff must be deemed entitled to benefits under the policy pursuant to *First Bank of Shinnston v. West Virginia Ins. Co.,* 185 W.Va. 754, 408 S.E.2d 777 (1991) and *Fliatreau v. Allstate Insurance Company*, 178 W.Va. 268, 358 S.E.2d 829 (1987) and therefore, Defendants' Motion to Dismiss must be denied.

In addition, with respect to Encompass Insurance's Motion to Dismiss, it has presented no evidence that Encompass Insurance and Encompass Insurance Company are not an alter-egos of Encompass Indemnity. As noted above, Encompass Indemnity's adjuster from its Special Investigations Unit, Michelle Grossman, presented a business card that identified her employer as "Encompass Insurance." (See **Exhibit A**). The Defendant has presented no evidence that Encompass Insurance or Encompass Insurance Company do not employ, supervise or oversee employees of Encompass Indemnity Company under the UTPA. As such, Encompass Insurance and/or Encompass Insurance Company's Motion to Dismiss must also be denied.

WHEREFORE, the based upon the forgoing, Plaintiff respectfully requests that this Court abstain from ruling upon Defendants' respective Motions to Dismiss as this matter was improvidently removed and this Court lacks subject matter jurisdiction. In the alternative, the Plaintiff respectfully requests that this Court deny the Defendants' Motions to Dismiss and to award such other and further relief that the Court finds proper.

BANK OF CHARLES TOWN
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West Virginia corporation,

Plaintiff,

v. **Civil Action No. 3:10-CV-102**

ENCOMPASS INSURANCE, et al.

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CERTIFICATE OF SERVICE

I, Laura C. Davis, counsel for the Plaintiff, do hereby certify that on the 29th day of October, 2010, I electronically filed the foregoing **PLAINTIFFS RESPONSE IN OPPOSITION TO THE EMCOMPASS DEFENDANTS' MOTIONS TO DISMISS PURSUANT TO FED. R. CIV.P. 12(b)(6)** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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